No. 341

SUPREME COURT
FILED
AUG 9 1957
JOHN T. FEY, Clerk

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

PETER DI PALERMO,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S APPENDIX

GEORGE J. TODARO
Attorney for Appellant
135 Broadway
New York 6, N. Y.

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Docket Entries

(A)

THE UNITED STATES

vs.

JOSEPH FARINA
PETER DiPALERMO
DANIEL SPEBDUTTO

Violation of T. 18 Sec. 472-473 & 371 USC—Unlawful possession of forged & counterfeit obligations of the US & unlawfully sell forged & counterfeit obligations of the US and conspiracy.

(SEAL)

(E)

DATE	PROCEEDINGS
Jan. 22, 1957	Filed affidavit & notice of motion for an order vacating & setting aside judgment of conviction of Deft, Peter DiPalermo. (Respectfully referred to Judge Ryan 2-11-57.) Noonan, J.
Feb. 11, 1957	Filed affidavit of Alan W. Richenaker dated 2-4-57 in opposition to motion filed 1-22-57.
Feb. 14, 1957	Filed notice of appeal to USCA from order entered 12-21-56. (Mailed copy to Warden at Detent. Hdqrts. NYC.)
Mar. 1, 1957	Memo endorsed on motion papers filed 1/22/57. Motion denied. So Ordered— Ryan, J.

DATE	PROCEEDINGS
Mar. 7, 1957	Filed notice of appeal to USCA from order entered 1/7/57—Copy mailed to Warden U. S. Pen., Atlanta, Ga.
Apr. 16, 1957	Filed Stipulation re:—Contents record on appeal Peter Di Palermo.

A TRUE COPY

HERBERT A. CHARLSON, Clerk

By RAOUL BRUGO, *Deputy Clerk*

Indictment

(1) UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

The Grand Jury charges:

1. That on or about the 28th day of April, 1949, in the Southern District of New York, JOSEPH FARINA, PETER DIPALERMO and DANIEL SPERDUTTO, the defendants, with intent to defraud, did keep in their possession and conceal, certain falsely made, forged and counterfeited obligations and securities of the United States, to wit, 500 counterfeited Federal Reserve Bank of Chicago notes, in the denomination of $10. each and 250 counterfeited Federal Reserve Bank of Chicago notes, in the denomination of $20. each (Title 18, Section 472, U. S. Code).

SECOND COUNT

The Grand Jury further charges:

1. That on or about the 28th day of April, 1949, in the Southern District of New York, JOSEPH FARINA, PETER DIPALERMO and DANIEL SPERDUTTO, the defendants, did, with intent that the same be passed, published and used as true and genuine, sell and deliver to Robert Lowery, certain false, forged, and counterfeited obligations and securities of the United States, to wit, 500 counterfeited Federal Reserve Bank of Chicago notes in the denomination of $10. each, and 250 counterfeited Federal Reserve

Bank of Chicago notes in the denomination of $20. each Title 18, Section 473, U. S. Code).

(2) THIRD COUNT

The Grand Jury further charges:

1. That from a date which to the Grand Jurors is unknown, up to and including the 28th day of April, 1949, in the Southern District of New York, JOSEPH FARINA, PETER DiPALERMO, and DANIEL SPERDUTTO, the defendants, conspired, combined, confederated and agreed, together and with each other, and with divers other persons to the Grand Jurors unknown, to violate the provisions of Sections 472 and 473 of Title 18, U. S. Code; that is to say, that the said defendants conspired, combined, confederated and agreed, together and with each other and with divers other persons to the Grand Jurors unknown, to keep in their possession and conceal with intent to defraud, certain false, forged and counterfeited obligations and securities of the United States, to wit, 250 counterfeited Federal Reserve Bank of Chicago notes in the denomination of $20. each, and 500 counterfeited Federal Reserve Bank of Chicago notes in the denomination of $10. each, and to sell and deliver to Robert Lowery the said 250 counterfeited Federal Reserve Bank of Chicago notes in the denomination of $20. each and the said 500 counterfeited Federal Reserve Bank of Chicago notes in the denomination of $10. each.

(3) OVERT ACTS

1. In pursuance of the aforesaid conspiracy and to effect the objects thereof, on or about the 26th day of April, 1949, JOSEPH FARINA, a defendant herein, had a con-

versation with Robert Lowery, in the vicinity of 345 West 17th Street, New York, N. Y.

2. In further pursuance of the aforesaid conspiracy and to effect the objects thereof, on or about the 28th day of April, 1949, JOSEPH FARINA, a defendant herein, had a conversation with Robert Lowery at the premises 40 East 19th Street, New York, N. Y.

3. In further pursuance of the aforesaid conspiracy and to effect the objects thereof, on or about the 28th day of April, 1949, JOSEPH FARINA, a defendant herein, received $1300 from Robert Lowery at 40 East 19th Street, New York, N. Y.

4. In further pursuance of the aforesaid conspiracy and to effect the objects thereof, on or about the 28th day of April, 1949, PETER DIPALERMO was at the premises 40 East 19th Street, New York, N. Y.

5. In further pursuance of the aforesaid conspiracy and to effect the objects thereof, on or about the 28th day of April, 1949, PETER DIPALERMO had in his possession $1300, consisting of thirteen $100 bills, at the premises 40 East 19th Street, New York, N. Y.

6. In further pursuance of the aforesaid conspiracy and to effect the objects thereof, on or (4) about the 28th day of April, 1949, DANIEL SPERDUTTO, a defendant herein, was at the premises 40 East 19th Street, New York, N. Y.

7. In further pursuance of the aforesaid conspiracy and to effect the objects thereof, on or about the 28th day of April, 1949, DANIEL SPERDUTTO loaned a Plymouth automobile to JOSEPH FARINA.

8. In further pursuance of the aforesaid conspiracy and to effect the objects thereof, on or about the 28th day of April, 1949, JOSEPH FAMINA and DANIEL SPERDUTTO entered a Plymouth automobile in front of premises 40 East 19th Street, New York, N. Y. (Title 18, Section 371, United States Code)

(5) A TRUE BILL

HUGH B. BAKER
Foreman

JOHN F. X. MCGOHEY
United States Attorney

(7)

DISTRICT COURT OF THE UNITED STATES

FOR THE

SOUTHERN DISTRICT OF NEW YORK

No C129/338

[SAME TITLE]

On this 22nd day of November, 1949, came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty by a jury of the offense of unlawful possession and sale of counterfeited obligations of the U.S. and conspiracy so to do T. 18 Sec. 472, 473, 371 USC as charged in three counts and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIFTEEN YEARS on count one, TEN YEARS on count two, FIVE YEARS on count three. Sentence on counts 1-2-3 to run concurrently.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

(s) SYLVESTER J. RYAN.
United States District Judge.

Notice of Motion to Vacate and Set Aside Judgment of Conviction

(8) UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavit of George J. Todaro, sworn to the 21st day of January, 1957 and the petition of Peter DiPalermo, annexed by reference, and upon all the files and records had heretofore, the undersigned will move this Court at a Motion Term thereof to be held in Room 318 of the U. S. Courthouse at Foley Square, Borough of Manhattan, City and State of New York, on the 28th day of January, 1957 at 10:30 o'clock in the forenoon or as soon thereafter as counsel can be heard, for an order vacating and setting aside the judgment of conviction referred to in the moving papers, entered the 28th day of April, 1949, and discharging the prisoner, and for such other and further relief as may be just and proper.

Dated: New York, N. Y.
January 21, 1957

Notice of Motion to Vacate and Set Aside Judgment of Conviction

Yours, etc.

GEORGE J. TODARO
Attorney for Defendant
Office and P. O. Address
135 Broadway
New York 6, N. Y.

To:

PAUL W. WILLIAMS
U. S. Attorney
Southern District of New York
Foley Square, New York

CLERK OF THE U. S. DISTRICT COURT
Southern District of New York
Foley Square, New York

Affidavit of George J. Todaro Read in Support of Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

GEORGE J. TODARO, being duly sworn, deposes and says:

I have been retained by the family of the defendant, Peter DiPalermo, to file a motion to vacate the judgment against him on the grounds urged in the annexed petition of Peter DiPalermo, the defendant herein, incorporated by reference.

I have read the grounds urged by the defendant and believe there is a great deal of merit to his application. While the grounds urged seem technical, nevertheless, they are the basis of our criminal law—and the failure of the indictment to charge scienter in count one of the indictment is a fatal error.

For all the reasons urged in the petition of Peter DiPalermo, this motion should be granted.

(Sworn to by George J. Todaro on January 21, 1957)

Petition Read in Support of Motion

(10) UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

MOTION TO VACATE VOID JUDGMENT OF CONVICTION AND SENTENCE

Now comes the defendant in the above entitled action and moves that the judgment of conviction by jury and sentence of fifteen years imposed upon him for the offense of "possessing counterfeit money of the United States with the intent to defraud" be vacated and set aside as null and void pursuant to the showing hereinafter made.

HISTORY OF THE CASE

On the 28th day of April, 1949, the defendant Di Palermo was convicted upon an indictment in three counts, charging possession of counterfeit money of the United States with the intent to defraud in violation of 18 U. S. C. 472 in the 1st count; selling counterfeit money in violation of 18 U. S. C. 473 in the 2nd count; and conspiracy to commit these offenses in violation of 18 U. S. C. 371 in the 3rd count. Defendant was sentenced to 15 years on count one; ten years on count two; and 5 years on count three; the sentences on counts two and three to be concurrent with each other, and with 15 years imposed on count one.

SPECIAL ALLEGATION

The judgment of conviction and sentence of 15 years imposed on count one for "possession of counterfeit money of the United States with intent to defraud" is null and void in (11) that omission of the allegation therein that defendant had knowledge of the counterfeit character of the money fails to charge him with any crime against the United States.

INDICTMENT COUNT ONE

1. That on or about the 28th day of April, 1949, in the Southern District of New York, Joseph Farina, Peter Di Palermo and Daniel Sperdutto the defendants, with intent to defraud did keep in their possession and conceal, certain falsely made forged and counterfeited federal reserve bank of Chicago notes in the denomination of $10 each and 250 counterfeited federal reserve bank of Chicago notes in the denomination of $20 each. (Title 18, Section 472, U. S. Code)

PERTINENT STATUTE 18 U. S. C. 472

Who ever, with intent to defraud, passes utters, publishes or sells, or attempts to pass, utter, publish, or sell, or with like intent falsely brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or security of the United States, shall be fined not more than $5,000 or imprisonment not more than fifteen years, or both.

Petition

PROCEDURAL PLEA

Pursuant to the controlling authorities supported in Huntly v. Schilds, 124 F. 2d. 250, it is moved that determination of the issue herein be confined to questions arising from the face of the indictment.

Pursuant to the controlling authorities supported in Walker v. U. S., 176 F. 2d. 796, it is further moved that the count of the indictment under attack be considered on the question of its validity without reference to other counts.

LAW AND FACT

The charge herein that the omission of Scienter in count one is fatal to the indictment as failing to charge a crime against the United States is predicated on the law laid down by the Supreme Court in U. S. v. Carll, 105 U. S. 611, (12) decided in 1881, and by the United States 7th circuit court of appeals in Hill v. U. S., 275 F. 187, decided in 1921.

In spite of the legislative revision of the Statute since these authorities were made; the promulgation of rules governing criminal procedure by the Supreme Court, and the vague and indefinite law of case authorities such as that of McKinney v. U. S., 172 F. 2d. 781, it is maintained that the Carll and Hill cases remains the law of the subject.

The law of these cases is very clear, and every student undoubtedly familiar with it. However for convenience of reference, a brief digest of each will be made here of their substance, including direct quotation.

United States v. Carll, 105 U. S. 611

Carll was indicted under Section 5431, revised Statute, with having "Feloniously, and with intent to defraud the bank of the metroplis . . ., did pass, utter, and publish upon and to the said bank of the metroplis, a falsely made, forged, and counterfeited obligation and security of the United States" (Which was set forth according to its tenor), against the peace, and contrary to the form of the Statute.

The Statute then prohibiting the offense is quoted by the Court as follows:

"Every person who, with intent to defraud, passes, utters, publishes or sells any falsely made, forged, counterfeited on altered obligation or other security of the United States, shall be punished by a fine of not more than $5,000, and by imprisonment at hard labor not more than fifteen years."

Carll brought the same question that is raised here by Di Palerino: did omission of the allegation that he knew the counterfeit character of the obligation fail to charge him with a crime? Answering this question the Court said:

(13) "The language of the Statute on which this indictment is founded includes the case of every person who with intent to defraud utters any forged obligation of the United States. But the offense at which it is aimed is similar to the common law offense of uttering a forged or counterfeit bill. In this case, as in that, knowledge that the instrument is forged and counterfeited is essential to make out the crime; and an uttering, *with* intent to defraud, of an instrument in fact counterfeit but supposed by the defendant to be genuine, though within the words of the Statute, would not be within its meaning and object.

This indictment, by omitting the allegation . . . that the defendant knew the instrument which he uttered to be false, forged, and counterfeit, fails to charge him with any crime. The omission is of matter of substance, and not a "defect or imperfection in matter of form only."

Hill v. United States, 275 F. 187

While it is true that the law of the Carll case involved only the offense of uttering, indicative of its far reaching effect is that forty years later the 7th Circuit court of appeals in Hill v. United States, 275 F. 187, unhesitantly and sternly extended it to include the companion offense of "possession," and this even though the Statute had since been revised (18 U.S.C.A. 265).

Delivering the opinion of the Court, Judge Evens said:

Plaintiff in error was convicted on . . . an indictment . . . with having in his possession a falsely altered and spurious bank note. The . . . Court is challenged because no Violation of any Statute is disclosed. We think the exception well taken. No where in this count is it alleged that plaintiff in error knew that the bank note in his possession was altered or spurious. This was a fatal omission. U. S. v. Carll, (14) 105 U. S. 611, 26 L. Ed. 1135. The count of the indictment here under consideration is not as full or complete as the one condemned in the Carll case.

"Neither in the government's brief nor on the oral argument do we find a serious attempt to justify or excuse the absence of this necessary allegation."

The Hill Case is directly in point here. In that case, as well as in the Carll Case, and in the instant case, trial court had instructed the jury to find upon the defendant's knowledge. In each case it played no part in the consideration of the essentiality of alleging knowledge in the indictment.

In the Hill case, the count alleging possession was reversed without reference to a second count sustained which alleged the knowing utterance of spurious bank notes, which seems to support the principle of law that each count must stand or fall on its face.

The instant case being virtually identical in substance as in the Carll and Hill cases, it appears that the only significant question to be determined is whether the law of those authorities, ancient as they are, still control the subject. Defendant is of the opinion that they do control.

McKinney v. United States, 172 F. 2d. 781

Indicative of the prestige of the Carll and Hill cases is that research has failed to uncover a single appellate authority purporting to reverse their law, and only one which attempts to modify them without any express commitment of having done so. Such is the McKinney Case, Supra, which seeks to modify by implication, inference and innuendo.

Considering the effect of this authority, two important facts should be borne in mind.

(1) McKinney was a layman who defended himself at the trial and, though assisted by counsel on the appeal, in all probability drafted the brief upon which the case was heard.

(15)

(2) The offense there was distinguishable from the Carll and Hill cases since it involved the unique and complex feature of split bank notes bearing a denomination of fifty dollars on one side, and twenty dollars on the other.

In determining effect of the omission of Scienter, the court resorted to the unprecedented action of going beyond

the indictment to show knowledge from the record of evidence.

The government asserted the frivolous position that the Carll Case decided in 1882, was for an offense similar under the Statute then under consideration to the common law offense of uttering a forged or counterfeit bill, while the offense of possession there being argued was "purely statutory." No direct attempt was made to square this fallacious contention with the finding in the Hill case to the contrary. The crux of the government's position in the McKinney case seems to have been that a spender of counterfeit or altered money is entitled to the allegation that he did so knowingly, but not if apprehended with it in his possession before he has the opportunity or occasion to attempt to spend it.

Such a position is clearly fatuos and taxes one's credulity to the uttermost.

The government further contended that the allegation "with the intent to defraud" is a comprehensive term which includes knowledge. The court declined to rule on this contention. It also declined to pass on the contention that possession, unlike uttering, is "purely statutory" and requires no charge of guilty knowledge. It would only state the government's position and the authority it relied upon, in the latter connection being U. S. v. Balinet, 258 U. S. 250; U. S. v. Behrman, 258 U. S. 280; and U. S. v. Combs, 73 F. Supp. 813.

The court finally settled the issue by concluding that it was seemingly impossible to conceive a situation where knowledge of alteration would not be part of a fraudulent intent (16) with respect to possession of separated fronts and backs of fifty and twenty dollar notes, pointing out that in the Hill and Carll Case the allegation of "knowl-

edge" was held essential since the bills were intact and had a sufficient appearance of genuineness to make attempt to pass feasible. It is significant that it never impugned authority of the Carll Case.

United States v. Balinet, 258 U. S. 250

The government cited the above case, and the Behrman and Combs cases, Supra, in the McKinney case in support of the proposition that the offense of possessing counterfeit money is purely statutory, requiring no allegation of Scienter. Since the Balinet case is the original authority on the subject it deals with, it alone will be discussed and analyzed for effect.

Balinet was convicted on an indictment brought under the narcotic drug import-export act (21 U.S.C. 173) charging him with unlawfully selling to another a certain amount of a derivative of opium and a certain amount of a derivative of cocoa leaves, not in pursuance of a written order on a form issued in blank for that purpose by the commissioner of internal revenue.

Balinet successfully brought demurrer on the ground that it failed to charge that he sold the inhibited drugs knowing them to be such. On review, the Supreme Court, reversing by 6-3 Vote, stated in substance that the practice of alleging Scienter in all crimes under the common law rule, whether an element of the Statute, had been modified with respect to prosecutions under Statute the purpose of which would be obstructed by such a requirement.

Not by any stretch of the imagination did the court in this opinion make a general obolition of the common law rule of alleging Scienter in charges of crime where it is not a part of the Statute. The government never seriously

(17) contended that it did: it merely cited the Balinet case on the McKinney appeal and hoped for favorable results. The court declined to pass on it altogether.

At 42 Sct. 302, note 3, they left no doubt that it is always a question of the construction of the Statute, and of the inference of the intent of congress.

If the purpose of the Statute, past and present, prohibiting the possession of counterfeit money becomes obstructed by the requirement of alleging Scienter, in the absence of legislation, it will be decided by the courts. Until then, that common law requirement approved by the Supreme Court in U. S. v. Carll, 105 U. S. 611, must remain the law. Morrissette v. U. S. 72 Sct. page 253, foot note (30) (1952).

Conclusion

In the cases discussed that tend to disagree with the Hill and Carll cases, many contentions have arisen, the most misleading of which is probably that rule 7 (c) dispenses in all respects with the legal science of criminal pleading. It is a rule that has as its purpose the simplification of pleading whose previous intricacy imburdened the court and counsel with its limitless capacity for working confusion, and left ignorant defendant's in a web of meaningless legal jargon. It is a rule whose very simplicity has caused, in reverse, the confusion its enactment was designed to abolish. No where can the abolition of the rudimentary essentials of criminal pleading be read into this simple rule.

It was implied in the McKinney case that the Statute upon which the Carll and Hill cases were decided have since been revised to the extent that the requirement of alleging Scienter no longer exists for those offenses. (18)

No claim could be more ridiculously incorrect. Basically, there has been *no changes* in the statutory elements prohibiting those offenses, with the exception of modifying and reducing the penalty, and severing the several offenses denounced by putting them into different sections of law.

The crime of uttering and possessing counterfeit money is not an ordinary offense.

Its very nature and design is to pry upon the unrestricted freedom of exchange among citizens who buy or sell, exposing them in their innocence to loss by fraud.

To abolish the common law rule of Scienter would be to subject them to the double loss of money and liberty irrespective of innocence.

Unlike the offenses related to sale of contaminated foodstuffs and poison drugs, which could be avoided by exercise of reasonable caution, the citizen is entitled to impunitive ignorance of the genuineness of counterfeit character of the moneys he is innocently exposed too. This right was comprehensively discussed in Hill v. United States, 275 F. 187.

In Carll v. U. S., Supra, the court remarked that "the fact that the Statute, when read in the light of the common law, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent."

It follows that the judgment of conviction under attack is void and should be vacated with prejudice to the United States.

PETER DI PALERMO
Defendant

Affidavit of Alan W. Richenaker Read in Opposition to Motion

(22) UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ALAN W. RICHENAKER, being duly sworn, deposes and says:

1. That he is an Assistant United States Attorney in the office of Paul W. Williams, United States Attorney for the Southern District of New York, and is familiar with the records and files pertaining to the above-named defendant.

2. This affidavit is filed in opposition to the motion made by the defendant DiPalermo to vacate judgment of conviction and sentence pursuant to Title 28, United States Code, Section 2255.

3. Indictment C 129-338 was returned May 6, 1949. The first count of C 129-338, which is the sole count of the indictment in question on this motion, is as follows:

"The Grand Jury charges:

"1. That on or about the 28th day of April, 1949, in the Southern District of New York, JOSEPH FARINA, PETER DiPALERMO and DANIEL SPERDUTTO, the defendants, with intent to defraud, did keep in

their possession and conceal, certain falsely made forged and counterfeited obligations and securities of the United States, to wit, 500 counterfeited Federal Reserve Bank of Chicago notes, in the denomination of $10. each and 250 counterfeited Federal Reserve Bank of Chicago notes, in the denomination of $20. each (Title 18, Section 472, U. S. Code)."

4. On November 22, 1949 defendant DiPalermo was sentenced on this count of the indictment to a term (23) of 15 years. He was sentenced to a term of 10 years on Count Two of the indictment, which charged him with the sale of this counterfeit money. He was sentenced to a term of 5 years on Count Three of the indictment, which charged him with conspiring with other co-defendants to possess and sell this counterfeit money. The sentences imposed by Hon. Sylvester J. Ryan, United States District Judge were to run concurrently.

5. An appeal from the judgment of conviction was taken by all defendants and the conviction was affirmed. *U. S.* v. *Farina, et al.*, 184 F. (2d) 18 (2d Cir. 1950). Subsequently, DiPalermo and his co-defendants petitioned the United States Supreme Court for a writ of certiorari, which was denied. 340 U. S. 875 (1950). A petition for re-hearing on denial of this writ was also denied. 341 U. S. 928 (1951). On a re-hearing before the Court of Appeals the conviction was again affirmed, 193 F. (2d) 436 (2d Cir. 1951). DiPalermo was represented in all of these proceedings on appeal by able and experienced attorneys, one of whom served the present motion.

6. DiPalermo was finally committed pursuant to the sentence imposed by Judge Ryan on November 24, 1950. Since his commitment, defendant DiPalermo has brought

several motions similar to the present motion on before this Court:

(a) A motion to suspend or to reduce sentence was denied by Judge Ryan on January 4, 1951;

(b) On August 10, 1954, a motion was made to vacate and set aside the judgment of conviction on the grounds that the defendant had a form of sleeping sickness and was actually "not present" in court at the time of (24) trial. Judge Ryan committed DiPalermo to the United States Public Health Service Hospital, Staten Island, New York for a mental and physical examination. He then conducted hearings on this motion, hearing many witnesses over an extended period of time. On February 17, 1955, in a very considered 69 page opinion, after weighing all the testimony of these various witnesses and his own recollection of the trial proceedings, Judge Ryan denied this motion of the defendant.

(c) A motion to vacate judgment of conviction and sentence, pursuant to Title 26, U. S. C., Section 2255, was denied by Judge Ryan on September 19, 1955. An appeal was taken from this order and the order was affirmed by the Court of Appeals on January 20, 1956.

7. The basis of the defendant's present contention is that the first count of Indictment C 129-338 under which he was sentenced for the term of fifteen years did not allege that he had knowledge of the counterfeit character of the money with which he was charged with having unlawful possession. Since this allegation was omitted from the indictment, the judgment of conviction and sentence imposed by Judge Ryan on this count is null and void. (DiPalermo's Affidavit, pp. 1-2.)

8. It is to be noted that although this indictment was returned almost eight years ago, the judgment of convic-

tion was appealed twice to the Court of Appeals and brought on twice for hearing unsuccessfully before the United States Supreme Court, and three motions to vacate this judgment have been submitted to this Court, that this is the first time that this contention has been raised in these proceedings.

(25) 9. The defendant bases his contention upon two cases, *United States* v. *Carll*, 105 U. S. 611 (1881) and *Hill* v. *United States*, 275 Fed. 187 (7th Cir. 1921). In both these cases it was held on appeal from the respective courts below based on the trial of the action that an indictment which did not charge the defendant with knowledge of the unlawful act with which he was charged was defective. Cf. *Morissette* v. *United States*, 342 U. S. 246 (1952).

10. However, it is a very different matter to raise such a question of law almost eight years after the indictment was returned and on a proceeding pursuant to Title 28, U. S. C., Section 2255.

It has been repeatedly stated in many jurisdictions that on a proceeding based on Section 2255, a Court will not review errors of law which should have been raised by timely appeal. *Adams* v. *United States*, 222 F. (2d) 45 (D. C. Cir. 1955); *Klein* v. *United States*, 204 F. (2d) 515 (7th Cir. 1953). As was stated aptly in *Taylor* v. *United States*, 177 F. (2d) 194, 195 (4 Cir. 1949):

> "Prisoners adjudged guilty of crime should understand that 28 U. S. C. A. §2255 does not give them the right to try over again the cases in which they have been adjudged guilty. Questions as to the sufficiency of the evidence or involving errors either of law or of fact must be raised by timely appeal from the sentence if the petitioner desires to raise

them. Only where the sentence is void or otherwise subject to collateral attack may the attack be made by motion under 28 U. S. C. A. §2255, which was enacted to take the place of habeas corpus in such cases and was intended to confer no broader right of attack than might have been made in its absence by habeas corpus."

An indictment which is not questioned by timely appeal will not be held defective on a motion pursuant to Section 2255 unless the charge was so obviously defective that by no reasonable construction could it be said to charge the offense on which the conviction was based. *Aaron v. United* (26) *States*, 188 F. (2d) 446 (4th Cir. 1951). An indictment which sets forth the elements of the offense committed by the defendant and which enables him to meet fairly that charge and to prepare his defense effectively for trial cannot be attacked collaterally on a motion pursuant to Section 2255. *United States* v. *Nickerson*, 211 F. (2d) 909, 910 (7th Cir. 1954). This indictment substantially follows the statutory language of the offense charged and is therefore sufficient. Cf. *United States* v. *Walker* 197 F. (2d) 287, 289 (2nd Cir. 1952).

11. On the basis of the foregoing facts and statement of law, it is submitted that this motion is without merit and should be denied by this Court.

(Sworn to by Alan W. Richenaker on February 4, 1957.)

Decision by Sylvester J. Ryan, *U.S.D.J.*

(19) Defendant, DiPalermo, moves to vacate the judgment of conviction and sentence imposed on November 22, 1949 on Count #1 only, following conviction by jury verdict on all three counts of an indictment returned against him on May 6, 1949.

Count #1 of the Indictment charges this defendant with possession of counterfeit currency in violation of Title 18, U. S. C. Sec. 472; on this count a sentence of 15 years was imposed. Count #2 charged this defendant with selling such counterfeit currency in violation of Title 18, U. S. C. Sec. 473; on this count a sentence of 10 years was imposed. Count #3 charged this defendant with conspiring with others named to commit the crimes charged in Counts #1 and #2; on this count a sentence of 5 years was imposed. It was directed that all sentences were to be served concurrently. The defendant is presently serving the sentence imposed.

The judgment of conviction was affirmed (184 F. 2d 18 (CA2-1950)); certiorari was denied (340 U. S. 875 (1950); rehearing denied 341 U. S. 928 (1951)); and on a further hearing by the Court of Appeals, the conviction was again affirmed (193 F. 2d 436 (CA2-1951)). Later applications to reduce the sentence imposed was denied on January 4, 1951; and to vacate the judgment of conviction was denied on February 17, 1955 and affirmed on appeal (228 F. 2d 901 (CA2-1956)).

It is to be noted that on this motion only the validity of the conviction on Count #1 is questioned and this upon grounds not heretofore urged.

It is now contended that the conviction on this count "is null and void in that omission of the allegation therein that defendant had knowledge of the counterfeit character

of the money fails to charge him with any crime against the United States".

Count #1 of the Indictment reads as follows:

> "1. That on or about the 28th day of April, 1949, in the Southern District of New York, Joseph Farina, Peter DiPalermo and Daniel Sperdutto, the defendants, with intent to defraud, did keep in their possession and conceal, certain falsely made forged and counterfeited (20) obligations and securities of the United States, to wit, 500 counterfeited Federal Reserve Bank of Chicago notes, in the denomination of $10, each and 250 counterfeited Federal Reserve Bank of Chicago notes, in the denomination of $20. each (Title 18, Section 472, U. S. Code)."

Rule 7 of the F. R. Cr. P. provides that:

> "The indictment . . . shall be a plan, concise and definite statement of the essential facts constituting the offense charged."

This rule was designed "to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay" (Rule 2). The essential facts required to be stated in an indictment do not include all of the details necessary to be proved by the Government or to be charged to the jury by the trial court, but only such facts as satisfy the requirement of the Sixth Amendment. This is accomplished:

> "if the indictment contains such description of the offense charged as will enable him to make his defense, and to plead the judgment in bar of any further prosecution for the same crime." Rosen v. U. S., 161 U. S. 29, 34.

See also

Bartell v. U. S., 227 U. S. 427, 431;
U. S. v. Starks, 6 F. R. D. 43;
U. S. v. Williams, 202 F. 2d 712.

When this test is applied to Count #1 of the Indictment, it is clear that DiPalermo was informed of the nature of the crime with which he was charged to enable him to properly and adequately prepare his defense, and if trial ensued and an attempt were thereafter made to try him again on the same charge, to successfully interpose a plea of former jeopardy.

An indictment is not open to collateral attack after conviction unless the circumstances are exceptional, the questions raised are of large importance, the need is apparent, and the sentencing court manifestly had no jurisdiction of the offense charged. Keto v. U. S., 189 F. 2d 247, 251. None of these elements are found here.

Finally, we note that the following charge was given by the trial judge:

> (21) "In substance, the first count alleges, and the Government is required to prove to your satisfaction beyond a reasonable doubt, that the defendants on that day possessed these counterfeit notes, *knowing that they were counterfeit*, and with the intent to pass and utter them as good and valid notes." Transcript of Record, p. 616, *United States* v. *Farina, et al.*, 184 F. (2d) 18 (2nd Cir. 1950) Docket 21694. (Emphasis supplied.)

The allegation in the Indictment that the defendants "with intent to defraud did keep in their possession and conceal" forged and counterfeit notes, was sufficient to

charge the defendants with knowledge of the spurious, unlawful and counterfeit character of the notes. Without such knowledge, since the notes are described as counterfeit, there could be no intent to defraud (see Banks v. United States, 239 F. 2d 409, 410).

Motion denied; so ordered.

SYLVESTER J. RYAN
U. S. D. J.

March 1, 1957

Notice of Appeal

(27) UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C 129-338

[SAME TITLE]

1. Name and address of the appellant: Peter DiPalermo United States Penitentiary, Atlanta, Georgia.

2. Name and address of attorney: George J. Todaro, Esq. 135 Broadway, New York 6, N. Y..

3. Offense: Violation of Title 18, U. S. C. Section 472, Title 18, U. S. C.; Section 473; and with conspiracy.

4. Defendant was convicted on Count One of the indictment charging violation of Title 18, U. S. C. Section 472; on this count, a sentence of fifteen years was imposed. Count Two: violation of Title 18, U. S. C. Section 473; on this count a sentence of ten years was imposed. Count Three charged this defendant with conspiring with others to commit the crimes charged in Count One and Two. On this count, sentence of five years was imposed. The sentences were to run concurrently. A motion was made attacking Count One of the indictment as being null and void and charging no crime against this defendant. That motion was denied. The judgment and order appealed from is the decision and order rendered herein by the Hon. Sylvester J. Ryan, United States District Judge, on the 1st day of March, 1957, denying the motion to vacate the judg-

ment of conviction under the first count of the indictment.

5. The defendant is now confined in the United States Penitentiary at Atlanta, Georgia.

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the above stated order.

Dated: New York, N. Y.
March 7, 1957

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